92-1324

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT W. DERVISHIAN,

and

WILLIAM A. DERVISHIAN,

Petitioners

versus

LAURA G. DERVISHIAN, Individually,
and as Attorney at Law

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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I. DID THE COURT'S SUSTAINING OF THE DEFENDANT'S DEMURRER, CONSTITUTE REVERSIBLE ERROR, AND PREJUDICE THE RIGHTS OF THE PLAINTIFFS IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II. DID THE TRIAL JUDGE IMPROPERLY PREJUDICE THE RIGHTS OF THE PLAINTIFF'S BY SUSTAINING THE DEFENDANT'S PLEA OF RES JUDICATA AND COLLATERAL ESTOPPEL TO THE PLAINTIFF'S BILL OF COMPLAINT AND AMENDED BILL OF COMPLAINT, AND GRANTING THE DEFENDANT'S MOTION TO DISMISS THE PLAINTIFF'S CAUSE OF ACTION IN EQUITY, IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III. DID THE TRIAL JUDGE IMPROPERLY FAIL TO RECUSE OR DISQUALIFY HIMSELF, AND THEREBY PREJUDICE THE RIGHTS OF THE PLAINTIFF'S IN

VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

IV. DID THE SUPREME COURT OF VIRGINIA ADMINISTRATIVELY AND JUDICIALLY DENY COUNSEL OF RECORD IN THE TRIAL COURT THE OPPORTUNITY TO APPEAR AND ASSIST COUNSEL OF RECORD IN THE SUPREME COURT DURING ORAL ARGUMENT ON THEIR PETITION FOR WRIT OF ERROR AND SUPERSEDEAS, AND THEREBY PREJUDICE THE RIGHTS OF THE PLAINTIFF'S IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19___

ROBERT W. DERVISHIAN,
and
WILLIAM A. DERVISHIAN, Petitioners

v.

LAURA G. DERVISHIAN, Individually,
and as Attorney at Law, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Your Petitioners, Robert W. Dervishian and William A. Dervishian, respectfully pray that a Writ of Certiorari issue on a direct appeal from the judgement of the Supreme Court of Virginia that affirmed an Order entered by the Circuit Court of the County of Henrico, Virginia, which dismissed your Petitioners equity suit against your Respondent.

The names of all parties appear in the caption of this case. Robert W. Dervishian and William A. Dervishian will be at all times relevant, hereinafter referred to as the Petitioners, the Appellants, or Plaintiffs. Laura G. Dervishian, will be referred to as the Respondent, Appellee, or Defendant.

OPINIONS DELIVERED

The letter opinion of the Circuit Court of the County of Henrico, Virginia, and Order dismissing your Petitioners Equity Suit are unpublished. [Order, November 4, 1991, Appendix p. 1; Letter Opinion, November 19, 1991, Appendix, p. 3; Order, January 10, 1992, Appendix, p. 8; Order, January 31, 1992, Appendix, p. 9]

The order and opinion of the Supreme Court of Virginia denying Petitioners' timely Petition for Writ of Error and Supersedeas is unpublished. [August 17, 1992, Appendix p. 10] The order opinion of the Supreme Court of Virginia denying Petitioners' timely Petition for Rehearing is unpublished. [September 18, 1992, Appendix p.11]. The order of the Supreme

Court of Virginia granting your Petitioners' Motion for Deferral of Issuance of Mandate is unpublished. [October 22, 1992, Appendix p.12]

STATEMENT OF JURISDICTION

The judgement of the Supreme Court of Virginia was entered on August 17, 1992, denying your Petitioners' timely Petition for Writ of Error and Supersedeas [Appendix p. 10]; and the Supreme Court of Virginia entered its Order on September 18, 1992 denying your Petitioners' timely Petition for Rehearing [Appendix p. 11], thereby affirming the Final Order entered by the Circuit Court of the County of Henrico, Virginia on January 10, 1992, which dismissed your Petitioners (Plaintiffs') Equity Suit against the Respondent. [Appendix p. 8] The Supreme Court of Virginia granted your Petitioners' Motion for Deferral of Issuance of Mandate on October 22, 1992. [Appendix p. 12] Your Petitioners invoke the jurisdiction of the United States Supreme Court pursuant to United States Code, Title 28, Section 1257(3).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 11 of the Virginia Constitution provides, in pertinent part:

"That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five."

STATEMENT OF THE CASE

Your Petitioners, Robert W. Dervishian, and William A. Dervishian, are aggrieved and appeal from a Final Order entered by the Circuit Court of the County of Henrico, Virginia on January 10, 1992, dismissing the your Petitioners' Equity Suit against the Respondent, Laura G. Dervishian; which was affirmed by the Supreme Court of Virginia on September 18, 1992. [Appendix p. 11]

The Trial Court did not take any evidence by way of testimony from any witness. The facts in this case are only those facts alleged in the Plaintiff's Bill of Complaint and the Plaintiff's Amended Bill of Complaint, which are to be taken, as admitted to be true. The Defendant owed a fiduciary duty to the Plaintiffs; and the Defendant violated that duty, as alleged. All allegations in the pleadings, are facts in this case, and the Trial Court has refused to recognize the Defendant's per se fraudulent conduct arising from her self dealing, as it relates to the Plaintiffs.

Simply stated, the facts are that during the time that the Defendant undertook to represent Virginia Dervishian Smith (hereinafter referred to as Testator), the Defendant actually defrauded the Plaintiffs, for the Defendant's own personal gain and unjust enrichment.

While carrying out her fraudulent scheme, the Defendant acted in various fiduciary capacities including Attorney At Law, Attorney In Fact, (defacto) guardian, (defacto) Trustee of the Trust of Mary J. Dervishian, deceased, as well as, Constructive Trustee for the benefit of the Plaintiffs.

Simply stated the facts are, that while acting in these said fiduciary capacities, Defendant manipulated and overreached the Testator during the Testator's lifetime for her own personal gain and unjust enrichment. The Defendant surreptitiously and systematically used various devices to exclude the Plaintiffs and other of the Testator's relatives from ownership of property to which they were rightfully and lawfully entitled; by

having Testator change her will to favor the Defendant; by taking certain of Testator's assets for herself and her sisters during the Testator's lifetime; by having herself made beneficiary of the proceeds of certain life insurance policies which passed outside of the administration of the Testators estate; and by assuming Testator's defacto capacity of Trustee of the residuary testamentary Trust of Mary J. Dervishian, and unlawfully taking parts of the said Trust corpus which belong to your petitioners and other relatives, and converting them to her own personal use.

The Defendant concealed her fraudulent self dealing and unjust enrichment from the Plaintiffs until after Testator's funeral on Friday, February 24, 1990. Without disclosure to the Plaintiffs, on Tuesday, February 27, 1990 the Defendant went to the Clerk's Office to perfect her scheme to defraud the Plaintiffs, by presenting Testator's purported will for probate.

The Honorable James T. Kulp, Judge, presided over a Henrico statutory Probate

Appeal instituted by William A. Dervishian, as the sole objector, which was tried by jury, on the sole issue of the testamentary capacity of the Testator, Virginia Dervishian Smith, to execute a paper dated December 9, 1988. William A. Dervishian was the sole Contestant, and at the onset Robert W. Dervishian filed a "Declaration of Withdrawal". After a three day probate trial, the jury returned a verdict after approximately ten minutes of deliberation. Upon entry of Judgement on the Verdict therein, Judge Kulp wrongfully recited that Robert W. Dervishian, had declared himself party contestant to that will contest, contrary to the true existing facts.

On February 20, 1991, your Petitioners filed their Bill of Complaint in the City of Richmond, Virginia, and the case was transferred to Henrico, Virginia, upon the Defendant's Motion for Change of Venue, for assignment to Judge James E. Kulp.

From the onset, and at each stage of the proceedings, Judge Kulp denied all Plaintiff's

oral and written motions for recusal and/or disqualification.

At Hearing on June 14, 1991, the Court sustained Defendant's Demurrer to Plaintiff's Bill of Complaint, and granted Plaintiffs leave to amend. Plaintiffs filed their Amended Bill of Complaint, and by letter opinion dated November 19, 1991 the Court stated "that the Plaintiffs can not make allegations which would entitle them to relief"; and sustained Defendant's Demurrer to the Amended Bill of Complaint AGAIN, and granted Defendant's Plea of Res Judicata and Collateral Estoppel to Plaintiff's Amended Bill of Complaint. By letter of December 3, 1991, the Plaintiff's advised the Court that Plaintiff's were able to make further allegation, and on January 10, 1992, the Court entered a Final Order dismissing the Plaintiff's equity cause, without a hearing.

The Supreme Court of Virginia administratively denied the Trial Court Counsel's timely request for the opportunity to appear and assist Counsel of Record for

Appellants in the Supreme Court of Virginia during oral argument made on their Petition for Writ of Error and Supersedeas on July 30, 1992. [NOTE: See, Virginia Petition for Writ of Error and Supersedeas, FACTS, for complete statement of the facts; also see, Virginia Petition for Rehearing.]

RAISING FEDERAL QUESTIONS

Federal questions to be reviewed on Writ of Certiorari, were first raised in the Circuit Court of Henrico, Virginia by Plaintiff's Motion to Set Aside the Order of January 10, 1992; and was heard on January 31, 1992, when Judge Kulp entered a Final Decree denying Plaintiff's Motion to Set Aside the Order of January 10, 1992 and for leave to further amend their Bill of Complaint [Appendix, p. 9]; and the federal questions were preserved on Appeal in the Supreme Court of Virginia by the Assignments of Error. The federal question presented for review on Writ of Certiorari in Question IV was first noted and objected to in the Virginia Petition for Rehearing. [See, Virginia Petition for Writ of Error and Supersedeas, Assignments of Error; and Virginia Petition for Rehearing]

REASONS FOR GRANTING CERTIORARI

A Review on Certiorari is necessary to prevent a state court from unconstitutionally abusing the use of the legal principle of Demurrer, to reject causes of action, where pleadings are adequate to state a cause of action.

A Review on Certiorari is necessary to prevent state courts from unconstitutionally abusing the use of the legal principles of Res Judicata and Summary Judgement, to reject fraud allegations in causes of action, where prior legal proceedings clearly adjudicated different issues.

A Review on Certiorari is necessary to uniformly establish objective standards regarding lack of impartiality, bias and prejudice of state court judges, and to establish separate state court tribunals with uniform procedures to hear the jurisdictional issue of lack of impartiality, bias and prejudice of a judge, when such jurisdictional issue has been raised by a party to a legal proceeding in a state court.

A Review on Certiorari is necessary to uniformly establish objective standards and procedures for recusal and disqualification, to obtain an impartial forum. A forum not charged with the potential for anamosity; contempt process; or a defensive or sensitive judical environment.

Also a process isolating change of venue issues, from recusal and disqualification issues; providing for a constitutionally fair process, narrowly focused upon guaranteeing an impartial tribunal; and a proper impartial atmosphere for determination and review of the recusal and disqualification issues in Virginia, without possible conflict between the bench and bar, to the detriment of the litigants.

A Review on Certiorari is necessary to prevent abusive unconstitutionally administrative practices and procedures by state courts when bringing matters forward on their docket.

I. DID THE COURT'S SUSTAINING OF THE DEFENDANT'S DEMURRER, CONSTITUTE REVERSIBLE ERROR, AND PREJUDICE THE RIGHTS OF THE PLAINTIFFS IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES.

In the case, now on appeal before this Court, the issue is the fraudulent conduct of the Defendant; and her self-dealing for her own personal gain and unjust enrichment, while acting in a capacity as a fiduciary, as an attorney at law, as an attorney in fact, and as a defacto guardian, and otherwise, all to the detriment of the Plaintiff's and their property rights.

The Supreme Court of Appeals of Virginia, in Matney et al. v. Yates 121 Va. 506, 93 S.E. 694, (1917), stated the principle which is to be applied to appellate review of a demurrer, namely, where a matter is admitted by demurrer, it must be regarded as a fact.

The Plaintiff's submit that the Bill of Complaint and their Amended Bill of Complaint were well plead, and sets forth a cause of action, based upon the Defendant's fraudulent

conduct. This long and well established principle of Virginia common law, was found by the Supreme Court of Virginia in Virginia Pocahontas Coal Co. v. Lambert, 107 Va. 368, 58 SE 561 (1907).

And Michie's Jurisprudence, Trusts and Trustees, Constructive Trusts, at page 106, expresses the Law of Virginia:

> "Courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done, interfere, and treat the case exactly as if the acts had been done; and this they will do by converting the party who has committed the fraud, and profited by it, into a trustee for the party in whose favor the act would otherwise have been done."

This principle has existed as the Law in Virginia since 1907, when The Supreme Court of Appeals of Virginia, embraced Perry on Trusts, Section 118 in Virginia Pocahontas Coal Co. v. Lambert, 107 Va. 368 at 373, 58 S.E. 561, (1907), as follows:

> Perry on Trusts, sec. 118, says that, If a person by his promises, or by any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to

him who fraudulently prevented the execution of a will or deed, he will be held to be a trustee for the person defrauded to the extent of the interest intended for him."

Also in Virginia Pocahontas Coal Co. v. Lambert, supra. the Supreme Court of Virginia adopted, as the Law in Virginia:

> "In general, says Pomeroy on Eq. Jur., sec. 1053, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any similar means, or under any similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein. * * *"

The elements necessary in Virginia Pocahontas Coal Co. v Lambert, (supra) to establish a cause of action are well plead, in both the Bill of Complaint and Amended Bill of Complaint.

The Statutory Probate Appeal did not provide Plaintiffs an opportunity to litigate any property rights issues. And Plaintiffs submit that the facts alleged, are without a

question far different from the facts for the establishment of a will.

Nicholson v. Shockey 192 Va. 270, 64 S.E. 2d 813 (1951), found: Where a fiduciary relationship is found to exist, any transaction to benefit of dominant party to detriment of other is presumptively fraudulent. 7 CJS, Attorney and Client, Sec. 65, p. 848.

The Defendant's fiduciary duty to the Plaintiffs is created by the factual situation, which exists between the parties, and the circumstances which surround the relationship of the parties. The Plaintiffs maintain that a fiduciary relationship existed with the Defendant for the benefit of the Plaintiffs, upon which the Plaintiffs relied, under the circumstances and facts that exist, in this case at bar.

The Court, by letter opinion of November 19, 1991, excused any fiduciary duty owed by the Defendant to the Plaintiffs, and erred when it decided:

"... This case is an attempt to

> circumvent the finding that Virginia Dervishian Smith had testamentary capacity when she executed the will of December 9, 1988, and is an attempt to have the will declared void. Plaintiffs have had their day in court on the validity of Virginia Dervishian Smith's will and should not be allowed to continue to attack its validity. ..."

When the Court erroneously sustained the Defendant's Demurrer, it preempted the Plaintiffs' opportunity to take testimony and present evidence proving the alleged fiduciary duty owed by the Defendant to the Plaintiffs, as was properly pled.

The Plaintiffs submit the a fiduciary relationship existed between the parties to this equity suit, and that it is so garden variety, that no label is required; and that it is properly alleged in the pleadings as a fiduciary relationship between the parties, for the benefit of the Plaintiffs, and is a fact.

The Plaintiffs and the Defendant in this case are all family members; Legatee Beneficiaries of the Testator (Aunt); Heirs at Law of the testator (Aunt); and vested remainder testamentary Trust Beneficiaries of

Mary J. Dervishian, Deceased (Grandmother).

Each of the parties, had conversations from time to time with each other, and with the testator regarding the affairs of the testator. The Testator expressed her true testamentary intent to William A. Dervishian, that she intended to leave all of her assets to be shared equally by all her nieces and nephews, upon her death.

The Plaintiffs submit that with the existence of special circumstances, all relationships may be a fiduciary one. This is because with the existence of clear facts, a single test exists which will factually establish a fiduciary relationship by the Defendant to the Plaintiffs. Plaintiffs submit that the single test is that Plaintiffs believed and relied upon the Defendants various misrepresentations, made to the Plaintiffs that the Defendant would protect the Plaintiffs best interests and conserve their property rights in all the Testator's assets (both during the Testator's lifetime and after her death), as well as, in the

residuary Trust of Mary J. Dervishian (their grandmother), and Plaintiffs trusted and had confidence in the Defendant's honesty.

The mere fact that Defendant ended up with ownership of the bulk of the Assets of the Testator, and that the Defendant is now also wrongfully, unlawfully, and fraudulently in possession and control of the residuary Trust of Mary J. Dervishian, deceased, is sufficient proof of Defendants breach of her fiduciary duty to the Plaintiffs, and their trust and confidence in the Defendant to properly carry out her fiduciary responsibilities to Plaintiffs, and the other heirs of Virginia Dervishian Smith, deceased.

A Court of Equity may, in every case, remedy any injustice perpetrated by the fraudulent conduct of a wrongdoer, and a Court of Equity is empowered to look behind any instrument to see the fraud, without setting the instrument aside or adjudicating the instrument to be invalid in whole, whether it be a will, deed, contract, or any other instrument lawfully made.

The Plaintiffs submit that the facts of the Defendant's fraudulent conduct; concealment of her fraudulent conduct; failure to disclose her fraudulent conduct; the Defendant's self-dealing for her own personal gain and unjust enrichment as a fiduciary; and facts creating a constructive trust by operation of law, have been well plead.

The Plaintiffs submit that they were further prejudiced by the Trial Court's failure to allow them to amend their pleadings to include the new allegations, where such leave is usually liberally granted by the court in Virginia.

For the reasons stated above, your Petitioners have been denied their Rights guaranteed to them by the Fourteenth Amendment to the United States Constitution, and Article I, Section 11 of the Constitution of Virginia, and a Writ of Certiorari should be granted.

II. DID THE TRIAL JUDGE IMPROPERLY PREJUDICE THE RIGHTS OF THE PLAINTIFF'S BY SUSTAINING THE DEFENDANT'S PLEA OF RES JUDICATA AND COLLATERAL ESTOPPEL TO THE PLAINTIFF'S BILL OF COMPLAINT AND AMENDED BILL OF COMPLAINT, AND GRANTING THE DEFENDANT'S MOTION TO DISMISS THE PLAINTIFF'S CAUSE OF ACTION IN EQUITY, IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In this case on appeal, the said Will of the Testator is not under attack by the Plaintiffs, since the said testator's will has been proven and admitted to probate in accordance with the law, but it is the conduct of the Defendant that is at issue, here.

In Virginia, a will does not have to be attacked and adjudicated invalid, in order for a Court of Equity to render it inoperative as to a wrongdoer, and make such divisions of the assets of a decedent among the heirs at law (of the assets fraudulently in the possession of a wrongdoer) as may be equitable according to law.

The Plaintiffs submit that the parties and issues in this equity cause are different, from those in the Statutory Probate Appeal.

For different parties, see Argument III dealing with impartiality and recusal. (Also see, Dillard v. Dillard, 78 Va. 208)

The Plaintiffs submit that different issues exist in this case at bar, as distinguished from the Statutory Probate Appeal (will contest). In the Statutory Probate Appeal, the sole issue joined was the testamentary capacity of the Testator on December 9, 1988; at the precise instant that the testator executed the said Will document.

The Supreme Court of Appeals of Virginia, in Eason v. Eason, 204 Va. 347, 131 S.E. 2d 280 (1963) stated:

> " '. . . [W]here the second action between the same parties is upon a different claim or demand, the judgement in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgement rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgement conclusive in another action."

The Trial Court also erred by its failure and refusal to draw the distinction that while "Undue Influence" is an "Issue" in a will contest; in this case on appeal, "undue influence" merely constitutes one of the possible elements of "Fraud"; and the marked and well defined difference between the two terms is recited in CJS, Vol. 37, Fraud, section 1, p. 208, as follows:

> "Fraud may exist without any undue influence; and undue influence may be exercised otherwise than through fraud, although doubtless fraud may be the means of acquiring an undue influence, and may be an efficient aid to its exercise."

The Plaintiffs could not have prosecuted their property rights, in a will contest as the Court is without jurisdiction, and is confined to the simple question, whether the paper to be admitted to probate is the true last will and testament of the deceased; and the Court's jurisdiction can not be extended further, for the Jurisdiction of a court of probate does not extend to the ascertainment and enforcement of rights of property, but only to establish, preserve, and perpetuate a

will. See, Smith v. Mustian, 217 Va. 980, 234 S.E.2d 292 (1977).

The Supreme Court of Virginia reaffirmed this principle of Virginia Law in Smith v. Mustian, 217 Va. 980, 234 S.E. 2d. 292.

> "A probate court is confined to the simple question, whether the paper admitted to probate is the true last will and testament of the deceased, and their jurisdiction can not be extended further, for the Jurisdiction of a court of probate does not extend to the ascertainment and enforcement of rights of property, but only to establish, preserve, and perpetuate a will."

The Trial Court's Letter Opinion of November 19, 1991, stated:

> "The plaintiffs have requested the court to establish a constructive trust and primarily rely upon Virginia Pocahontas Coal Co. v. Lambert, 107 Va. 368 (1907). The Court is of the opinion that no basis exists for the Court to establish a constructive trust. In the Court's opinion the key to this case is the validity of Virginia Dervishian Smith's will of December 9, 1988."

(Also see, Plaintiffs' Argument No. I & III, for additional discussions as to Virginia Pocahontas Coal Co. v. Lambert, supra.)

As the result of the Defendant's self dealing for her own personal gain and unjust

enrichment, the Defendant is now in the exclusive possession and control of the Testator's entire residuary estate, estimated to be approximately $500,000, as well as, other items of property that belong to your Petitioners.

For the reasons stated above, your Petitioners have been denied their Rights guaranteed to them by the Fourteenth Amendment to the United States Constitution, and Article I, Section 11 of the Constitution of Virginia, and a Writ of Certiorari should be granted.

III. DID THE TRIAL JUDGE IMPROPERLY FAIL TO RECUSE OR DISQUALIFY HIMSELF, AND THEREBY PREJUDICE THE RIGHTS OF THE PLAINTIFF'S IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Your Petitioners say that the Trial Judge's impartiality in this case can be reasonably questioned on the grounds of his judicial conduct, prior judicial involvement, and other factual grounds.

Virginia has no OBJECTIVE standard that is constitutionally sufficient or available to a litigant to test the bias, prejudice, and impartiality of a Judge presiding over a legal proceeding.

The only standard available to test a Virginia Judge's impartiality for bias and prejudice, is a SUBJECTIVE standard; which is self-administered in a judge's consciousness.

Although Virginia law allows voir dire and discharge of prospective jurors (trier of fact); Virginia has no procedure available for a litigant to reasonably establish bias, prejudice, and partiality of a Judge presiding

over a legal proceeding, when the Judge is the trier of fact, as in this equity cause. The practice and procedure in Virginia requires a Trial Judge to apply a subjective standard to himself.

The most compelling argument for the application of an objective standard in Virginia, is that, a biased Judge is not any more able to recognize his own bias; than a mentally incapacitated man is able to recognize his own mental incapacity; or an insane man is able to recognize his own insanity. The Virginia Cannons require a Judge to apply a subjective standard to himself, and determine whether a third person could reasonably question his impartiality.

Cannon III(C)(1) of the Virginia Cannons of Judicial Conduct sets forth the subjective standard that a Virginia Judge applies to himself, as follows:

> "That a Judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." See, Virginia Cannons of Judicial Conduct, Cannon III(C)(1),

"That a Judge should not suffer his

conduct to satisfy the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the influence of any party." See, Virginia Cannons of Judicial Conduct, Cannon III(C)(1).

Your Petitioners submit that the Trial Judge's bias, prejudice, and impartiality in this case, can be reasonably questioned as the result of his judicial conduct, his prior judicial involvement in a will contest, and on other factual grounds.

The First Circuit of the United States Court of Appeals has set forth a test of objectivity which should be applied in Virginia, and adopted in this case at bar. Blizard v Frechette, 601 F.2d 1217, (1st Cir. 1979) at page 1220 as follows:

> "The Court began its consideration by setting forth our interpretation of the new 28 U.S.C. section 455(a) as propounded in United States v. Cepeda Penes, 577 F.2nd 754 (1st Cir. 1978) and United States v. Cowden, 545 F.2d 257 (1st Cir. 1976). In essence, section 455(a) allows a judge to disqualify himself if a reasonable man would have factual grounds to doubt the impartiality of the court. Such a standard allows recusal when objective appearances provide a factual basis to doubt the impartiality, even though the judge himself may subjectively be confident of his ability to be evenhanded. As the

court recognized, Cepeda Penes also stands for the proposition that a judge's conduct during prior judicial involvement in a case (as opposed to extrajudicial knowledge of the parties or evidence) can conceivably provide a factual basis for doubting impartiality. ..."

When the federal test for objectivity is applied to the Virginia Trial Judge's judicial conduct in this case, there could be no clearer set of facts than those that exist in the case at bar, for reasonably questioning the Trial Judge's impartiality.

The trial judge's conduct in the Statutory Probate Appeal, coupled with his conduct in this instant case, clearly show sufficient proof of the Trial Judge's lack of impartiality which prejudiced the Plaintiffs, and their cause.

William A. Dervishian, instituted a statutory Appeal to Probate, on the sole issue of the testamentary capacity of the decedent.

Thereafter, the Plaintiffs, filed this Bill of Complaint against the Defendant and prayed for the ascertainment and enforcement of their property rights by way of a

constructive trust to recover their property, upon the equity grounds that the Defendant's fraudulent conduct had deprived them of their property and rights of property. On Defendant's motion, this case was transferred from the Circuit Court of the City of Richmond (where many impartial judges presided); and at the request of the Defendant, the case was accepted by the Honorable James E. Kulp, Judge of the Circuit Court of the County of Henrico (where many impartial judges also presided). [Va. Code 8.01-265 and 8.01-267].

There appears to be no clearer a distinction set out in the Virginia law, than that the statutory Probate jurisdiction of a Circuit Court is to establish a last will and testament, and nothing more. Clearly, the statutory Probate jurisdiction of a Circuit Court in Virginia does not provide a forum for the ascertainment or enforcement of property rights of any party to a will contest.

The Supreme Court of Virginia reaffirmed this principle of Virginia Law in Smith v. Mustian, 217 Va. 980, 234 S.E. 2d. 292.

"A probate court is confined to the simple question, whether the paper admitted to probate is the true last will and testament of the deceased, and their jurisdiction can not be extended further, for the Jurisdiction of a court of probate does not extend to the ascertainment and enforcement of rights of property, but only to establish, preserve, and perpetuate a will."

The most glaring factual evidence of the Trial Judge's lack of impartiality is the fact that the trial judge refused to recognize any difference between the issues or parties in the prior statutory probate appeal, and the issues or parties in the case at bar.

Regardless of the interpretation any unbiased and impartial Court might place on the issues alleged in the Plaintiff's pleadings, it is clear that the issues herein, are entirely different from those litigated in the statutory probate appeal proceeding; and that the parties herein, are different from the parties to the statutory probate appeal proceeding.

Other facts that constitute evidence of the trial judge's lack of impartiality which prejudiced the Plaintiffs and their cause, are

as follows:

1. At the onset of the statutory Probate Appeal the Trial Judge accepted Robert W. Dervishian's Declaration of Withdrawal, at the same time that the Trial Judge expressed his intention to bind Robert W. Dervishian to the statutory Probate Appeal as a party; and to prejudice his lawful rights to proceed otherwise. (See, Dillard v. Dillard, 78 Va. 208). The Trial Judge factually evidenced his lack of impartiality, bias and prejudice against your Petitioners at the conclusion of the statutory Probate Appeal when (contrary to the true existing facts) the Trial Judge wrongfully entered in the Court's Order of June 5, 1990, that Robert W. Dervishian had: "... thereafter declared himself to be a contestant ...".

2. The Trial Judge factually evidenced his lack of impartiality, bias and prejudice against the Plaintiffs and their equity cause, when he rejected the Plaintiff's pleadings. The Trial Judge was clearly predisposed to uphold the Testator's will from the onset,

even though the said will was not an issue in the case at bar. The Trial Judge obviously equated upholding the Testator's will, with preventing the Plaintiffs from ascertaining and enforcing their property rights. The Trial Judge recited his predisposition of the Plaintiffs cause, in his letter opinion dated November 19, 1991, as follows:

> "... The Court is of the opinion that no basis exists for the Court to establish a constructive trust. In the Court's opinion the key to this case is the validity of Virginia Dervishian Smith's will of December 9, 1988. ..."

3. The Trial Judge factually evidenced his lack of impartiality, bias and prejudice against the Plaintiffs and their cause when he adopted the facts and issues in the Probate Appeal; and applied them to the equity issues raised by the pleadings in this case.

4. The Trial Judge factually evidenced his lack of impartiality, bias and prejudice against the Plaintiffs and their cause, by his refusing to accept the facts set out in the Plaintiffs pleadings as true for purposes of review on demurrer; and the Trial Judge

refused to recognize that the facts set out in the Plaintiff's pleadings were adequate to state a cause of action.

5. The Trial Judge factually evidenced his lack of impartiality, bias, prejudice, and predisposition of this case, by his continued prejudging of the anticipated facts and issues in this case, as shown by his letter opinion dated November 19, 1991, to-wit:

> "... The Court is of the opinion that plaintiffs cannot make allegations which would entitle them to relief, and that this case should now be dismissed. ...".

6. The Trial Judge's rulings factually evidenced his lack of impartiality, bias and prejudice in the case at bar. The Trial Judge's rulings herein, were inconsistent and contradictory to his rulings in the prior statutory probate appeal, with regard to fiduciary issues; and the application of the Plea of Res Judicata and Collateral Estoppel in this case. During the statutory probate appeal, Judge Kulp ruled that fiduciary issues could not be litigated in the statutory probate appeal. However, in the case at bar,

Judge Kulp ruled that the same fiduciary issues could have and should have been litigated in the statutory probate appeal proceedings; and granted Defendants plea of Res Judicata and Collateral Estoppel on that basis. (Compare, Probate Appeal Record to Transcript of Hearing of October 14, 1991.)

7. The Trial Judge factually evidenced his lack of impartiality, bias and prejudice against the Plaintiffs and their cause when he failed to draw the distinction between "Undue Influence" as an issue in a statutory probate proceeding; and undue influence as merely a possible element of the equitable tort of Fraud; as recited in CJS, Vol. 37, Fraud, section 1, p. 208:

> "Fraud may exist without any undue influence; and undue influence may be exercised otherwise than through fraud, although doubtless fraud may be the means of acquiring an undue influence, and may be an efficient aid to its exercise."

8. The Trial Judge factually evidenced his lack of impartiality, bias and prejudice when he declared in his letter opinion dated November 19, 1991:

"... This case is an attempt to circumvent the finding that Virginia Dervishian Smith had testamentary capacity when she executed the will of December 9, 1988, and is an attempt to have the will declared void. Plaintiffs have had their day in court on the validity of Virginia Dervishian Smith's will and should not be allowed to continue to attack its validity. ..."

9. The Trial Judge factually evidenced his lack of impartiality, bias and prejudice against the Plaintiffs and their cause; by refusing to accept the fact that the Defendant had recognized the Trial Judge's bias, prejudice, and lack of impartiality to the Plaintiffs and their cause; and had requested his assignment as Trial Judge, in order to benefit from the Trial Judge's lack of impartiality, bias and prejudice to the Plaintiffs and their cause, in this case at bar and on prior occasions.

The Judicial System in Virginia fails to adequately safe guard your petitioner's Constitutional Right to an impartial judge in this case at bar. Virginia law fails to provide any litigant with a reasonable procedure to establish judicial abuse for

appellate review. There is no Virginia law that establishes a valid standard to test lack of impartiality, bias and prejudice of Judges in Virginia. No existing Virginia law satisfies the United States Constitutional requirement of Due Process of Law and Equal Protection of the Law [Fourteenth Amendment].

All the authorities agree that due process of law requires that a person shall have reasonable notice and reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting his right to liberty or property. See Ward Lumber Co. v. Henderson White Mfg. Co., 107 Va. 626, 59 S.E. 476 (1907); Commission of Fisheries v. Hampton Rds. Oyster Packers & Planters Ass'n, 109 Va. 565, 64 S.E. 1041 (1909); See also, Graham v. Mitchell, 529 F. Supp. 622 (E.D. Va. 1982) as to affecting his right to property.

The Supreme Court of Virginia has promulgated and adopted the Rules of the Virginia Supreme Court, Part VI, Section 3, Canons I and II, and established sanctions for

such unethical judicial conduct. Establishing sanctions for violations of an ethical Cannon does not provide a remedy to your Petitioners for the ascertainment and enforcement of their property rights; nor does it return their property to them, from wrongdoers.

These Cannons have been used in Virginia to allow a judge of a Court of Record to determine for himself, whether he harbors bias or prejudice which will impair his ability to be impartial, See Justice v. Commonwealth, 222 Va. 667, 673, 283 S.E. 2nd 905, 908 (1981), cert. denied, 455 U.S. 983 (1983); Terrell V. Commonwealth 12 Va. App. 285 (April, 1991).

In Terrell v. Commonwealth, Supra, the Virginia Court of Appeals recited:

> "... The trial judge concluded that he had no question but that he was "able to hear the case impartially." In the first place, "[a] judge is presumed not to confuse the evidence in one case with that of another." Dove v. Peyton, 343 F. 2d 210, 214 (4th Cir. 1965). Secondly, assuming arguendo some animosity between the trial judge and defense counsel, that does not suggest that the trial judge would deny a fair trial to the lawyer's indigent client.

Therefore, we hold that upon this record there is no showing that the trial judge abused his discretion in failing to recuse himself. ..."

Your Petitioners respectfully submit that the principle that a judge is presumed not to confuse the evidence in one case with that of another, has been overcome, by the facts, circumstance and incidents of trial in this case at bar.

Your Petitioner's submit that the law in Virginia, in a civil or criminal case, is constitutionally insufficient to afford any litigant a reasonable opportunity show the bias and prejudice of a Judge of a Court of Record in Virginia because it does not provide the litigant any reasonable procedure to generate a reviewable record.

When any Virginia Judge recuses himself, the basis for his recusal is not objectively measurable by any observer; and the result will never establish a precedent for recusal by any other Virginia Judge. In Virginia the procedure and standard for recusal or disqualification denies all Litigants equality

under the law because the standard is unconstitutionally too broad and vague; and in effect, is no standard at all; and constitutes no reasonable standard, basis, or procedure to establish or preserve a reviewable record; and denies your Petitioners' due process of law and the equal protection of the law.

There is no way to document a hearing that has taken place in a "Judge's mind". A hearing that has merely taken place in a "Judge's mind" on the issue of his lack of impartiality bias and prejudice affords no reasonable opportunity for the litigants to voir dire the Judge (finder of fact). The constitutional safe guards applied to a juror (fact finder) are not available to a litigant with a judge (fact finder) in Virginia. It is not possible to do so without raising an appearance of disrespect or contempt for the Court. See, Holt v. Commonwealth, 205 Va. 332, 136 S.E. 2d 809, reversed, 85 S. Ct. 1375, 381 U.S. 131, 14 L. Ed. 2d 292 (1964). When such a situation arises, the judicial attitude is defensive at best, and the

jurisdictional challenge adversely affects and aggravates any "partiality" which may exist.

Your Petitioner's submit that a fair review of Virginia reported cases in the last two hundred and sixty-three years (1729 - 1992) reveal that only thirteen reported cases were reviewed on appeal; and only on one occasion was a Virginia judge found to have abused his discretion. Your Petitioner's submit that such a history, merely reflects, the Constitutional deficiencies of Virginia Law and Procedures as to recusal and disqualification of judges in Virginia.

Virginia has no statutory law governing recusal, disqualification, bias or prejudice. See Taylor v. Taylor 185 Va. 126, 37 S.E. 2d 886; but see Va. Code 8.01-265 and 8.01-267.

Usually there are statutes in other States which govern this procedure. See Taylor v. Taylor, supra.

The law of disqualification and recusal is found in the Common Law, in Virginia, and case decision. If any procedure is prescribed or standards to be followed in Virginia, they

are presented in Taylor v. Taylor, supra., as follows, in a 1946 decision, with a 1837 precedent (Boswell case):

> "When a judge is interested in a cause or related to either of the parties, or in any manner situated so as to render improper his judgment to preside at the trial, it shall be lawful for such judge to cause the same to be removed to the next circuit and to the most convenient court in that circuit for trial. ..." 1 Rev. Code Ch.69, Section 54, p.239.

The Virginia Court of Appeals further stated, regarding the above, in Taylor v. Taylor, supra., hereafter referred to as the 1837-1946 Recusal Standard:

> "Here the power is given but its exercise is left to the discretion of the judge. It is not for this Court to sit in judgment upon the matter in which he does exercise the discretion, for it is dependant upon his judgment; moreover from the very nature of the act, the propriety of that judgment depends upon his self-consciousness, into which we can not dive. ..."

The Court acknowledged that appellate review was available, in Taylor v. Taylor, supra., stating:

> "Within liberal limits, a judge, in determining his own qualifications must exercise sound judicial discretion, SUBJECT TO REVIEW. ..." (Emphasis added by upper case letter treatment)

In 1992, at the present, another standard is applied in, in Terrell v. Commonwealth, 12 Va. App. 285, 403 S.E. 2d 387 (1991), by Virginia, by reference to the Rules of the Supreme Court, Cannons of Judicial Ethics; hereinafter referred to as the 1992 Recusal Standard.

Since 1729 (Call Vol. 1), the beginning of reported case opinions in Virginia, there are only thirteen reported cases related to recusal and disqualification, found by your Petitioners, as follows:

Criminal Cases, seven in number;

1. Forde v. Commonwealth,
   16 Grat. (57 Va. 547 (1864)

2. Stuart v. Commonwealth,
   91 Va. 152, 21 S.E. 246 (1895)

3. Slayton v. Commonwealth,
   185 Va. 371, 38 S.E. 2d 485 (1946)

4. Holt v. Commonwealth,
   205 Va. 332, 136 S.E. 2d 809, reversed
   85 S. Ct. 1375, 381 U.S. 131, 14 L. Ed.
   2d 292 (1964)

5. Mason v. Commonwealth,
   219 Va. 1091, 254 S.E. 2d 116,
   Certiorari denied, 100 S. Ct. 239, 444
   U.S. 919, 62 L. Ed. 2d 176 (1979)

6. Justus v. Commonwealth,
222 Va. 667, 283 S.E. 2d 905, Certiorari denied, Justus v. Virginia, 102 S. Ct. 1491, 455 U.S. 983, 71 L. Ed. 2d 693, Habeas Corpus dismissed, 897 F. 2d. 709, rehearing denied, (1981)

7. Terrell v. Commonwealth,
12 Va. App. 285, 403 S.E. 2d 387 (1991)

Civil Cases, six in number:

1. Boswell v. Flockheart
8 Leigh (35 Va.) 364, (1837)

2. Ewing v. Haas,
132 Va. 215, 111 S.E. 255 (1922)

3. Hentz v. Wallace Adm'r,
153 Va. 437, 150 S.E. 389 (1929)

4. Taylor v. Taylor,
185 Va. 126, 37 S.E. 2d 886, rehearing denied 185 Va. 416 38 S.E. 2d 449 (1946)

5. Helen W. v. Fairfax County
Dept. of Human Development,
12 Va. App. 877, 407 S.E.2d. 25, (1991)

6. Buchanan v. Buchanan ____ Va. ___,
415 S.E. 2d 237, (1992)

It is interesting to note that in the entire reported Judicial History of the Commonwealth of Virginia, of all the reported cases, only once in 1895 has the Supreme Court of Virginia (Stuart v. Comm., supra.), found that a Virginia judge been found to abuse his sound discretion, on review. All twelve other Virginia appellate reviews affirmed the

judge's self-determination of qualifications.

It is important to note that the Supreme Court of the United States found that a Virginia Judge had abused his discretion in Holt v. Comm., supra.; overturning an opinion of the Supreme Court of Virginia.

It can be argued that this is because Virginia's recusal system operates well, but your Petitioners submit that it reflects a recusal or disqualification system which is tainted by constitutionally unreasonable, standards and procedures; inadequate to protect your Petitioner from an abuse of discretion by any judge in Virginia, regarding the Jurisdictional issue of ensuring an impartial judge (fact finder), and an impartial tribunal; whether it be in the years 1729, 1776, 1837, 1946, 1964, 1991, 1992, or at the time of this case at bar.

It, in the affirmative, is a constitutionally defective system of broad, vague, and unenforceable standards and procedures; which allow a Virginia judge to preside whenever he may choose; regardless of

recusal and disqualification standards and procedures; regardless of the degree he may be partial or impartial. It provides no constitutional mandated, reasonable protections whatsoever, as evidenced in this case at bar.

It permits, no voir dire of a judge (fact finder); no reasonable method or procedure to prepare a constitutionally mandated reviewable record on appeal; no uniformity of the self-administered determination by any two judges, to assure the litigant of the constitutionally mandated equality of protective application, implementation and enforcement of equal protection of the law; no constitutionally mandated, standard which is not vague and unambiguous; and is understandable by the litigants, be they subject to criminal or civil litigation in law or equity, and no reasonable expectation of constitutionally mandated impartial justice by judge trial as may be compared and distinguished from jury trials.

It also permits a judge tainted with partiality to preside at jury trials, and direct and steer verdicts; by words, gestures, timing, level of voice used in rulings, the application of the rules of evidence, quickness and sharpness of ruling, and even the failure to honor simple requests; such as, to approach the bench, easily and softly granted at the request of one litigant, and begrudgingly and harshly granted to the other litigant; and so it goes, on and on through out a jury trial, relentlessly, to show disfavor, partially steering a verdict, which may result in ten minutes of jury deliberation to reach a verdict on a complex three day jury trial; all of which affects the public's perception of judicial fairness, so that public confidence in the integrity of the judicial system is maintained. See Buchanan v. Buchanan, supra.

In the opinion of your Petitioners, the facts, circumstances and incidents of trial, together with the magnitude and frequency of erronious application of principles of

Virginia law in this case at bar, will not support the public perception of judicial fairness, so that public confidence in the integrity of the judicial system is maintained; nor, as attorneys at law, does it support their perception of judicial fairness or their dedicated confidence in Virginia's Judicial System.

Therefore, your Petitioners submit that Virginia's system of justice is constitutionally unfair, unreasonable, and unequal as to all litigants; and has particularly denied your Petitioners their constitutionally mandated protections of Due Process of Law and Equal Protection of the Law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America, and Article I, Section 11 of the Constitution of Virginia.

Your Petitioners respectfully submit that they have had no protection from any partial judges in this case, and request a Writ of Certiorari.

The Trial Judge's failure to recuse himself in the case at bar, constituted

reversible error and denied the Plaintiffs' rights of Due Process of Law, and Equal Protection of the Law which provides for the Plaintiffs and their cause to have an unbiased and impartial trial judge; fair and impartial rulings in the course of this equity matter; and reasonable opportunity to be heard.

The Common Law of England, in so far as it is not repugnant to the principles of Virginia's Bill of Rights and United States Constitution, shall continue in full force. [See, Virginia Code, Title 1, Section 10.]

Your Petitioners respectfully submit Virginia Law and Judicial System is void of Virginia stardards or procedure as to the threshold Jurisdictional issue of Judicial Recusal and Disqualification which must meet constitutional requirements, be they federal or state.

For the reasons stated above, your Petitioners have been denied their Rights guaranteed to them by the United States Constitution, and Virginia Constitution, and a Writ of Certiorari should be granted.

IV. DID THE SUPREME COURT OF VIRGINIA ADMINISTRATIVELY AND JUDICIALLY DENY COUNSEL OF RECORD IN THE TRIAL COURT THE OPPORTUNITY TO APPEAR AND ASSIST COUNSEL OF RECORD IN THE SUPREME COURT DURING ORAL ARGUMENT ON THEIR PETITION FOR WRIT OF ERROR AND SUPERSEDEAS, AND THEREBY PREJUDICE THE RIGHTS OF THE PLAINTIFF'S IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Your Petitioner, Robert W. Dervishian, Esquire, was Trial Counsel of Record in the Circuit Court in this case. Also, he was Appellant Counsel of Record in another appeal maturing on the docket of the Supreme Court of Virginia.

The Supreme Court of Virginia administratively scheduled both this appeal and the other appeal for the same date, time, and place for oral argument for ten minutes on the respective Petitions for Writ of Error and Supersedeas in the Virginia Supreme Court Building in Richmond, Virginia, on July 30, 1992 at 1:30 p.m.

On July 22, 1992, Robert W. Dervishian, Esquire, timely requested an administrative rescheduling of oral argument in one of the appeals, so as to afford the opportunity for

him to assist William A. Dervishian, Esquire, Counsel of Record for Appellants, during oral argument in this case; and on July 24, 1992, Kathy Williams of the Chief Staff Attorney's office of the Virginia Supreme Court advised your Petitioners that their administrative Request for Rescheduling of Oral Argument was denied by the Supreme Court of Virginia.

On the day of oral argument, July 30, 1992, your Petitioners again requested the docket assistant on duty in the Supreme Court Building, to pass by one of the appeals on the docket for a latter time on that same docket, and the docket assistant refused to make any change to the docket scheduling.

Oral argument in this appeal was set, first on the docket in the Supreme Court Building in Hearing Room B; and oral argument in the other appeal was set, first on the docket, in the Supreme Court Building in the Main Courtroom. Both arguments were set at 1:30 p.m. on July 30, 1992, and heard at the same time, at locations approximately a mere 150 feet apart.

The Supreme Court of Virginia's administrative action prejudiced your Petitioners by denying Trial Counsel of Record, Robert W. Dervishian, Esquire, the opportunity to appear and assist Appellant Counsel of Record, William A. Dervishian, Esquire during oral argument on the Petition for Writ of Error and Supersedeas in the Supreme Court of Virginia.

Such administrative action by the Supreme Court of Virginia is grossly abusive and violated your Petitioners Rights of Due Process and Equal Protection of the law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 11, of the Constitution of Virginia, in that such administrative action denied Petitioners a reasonable opportunity to be heard in this case in the Supreme Court of Virginia.

All the authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial

tribunal, before any binding decree can be passed affecting his right to liberty or property. See, Ward Lumber Co. v. Henderson -White Mfg. Co., 107 Va. 626, 59 S.E. 476 (1907); Commission of Fisheries v. Hampton Rds. Oyster Packers & Planters Ass'n, 109 Va. 565, 64 S.E. 1041 (1909); Graham v. Mitchell, 529 F.Supp. 622 (E.D. Va. 1982).

In addition, the Supreme Court of Virginia's administratively denied your Petitioners the reasonable opportunity to review the record transmitted to the Supreme Court of Virginia in this case; for the purpose of confirming that all the appropriate documents had actually been included and transmitted as part of the record for the Justices review on oral argument; and for the purpose of preparation for oral argument, after the Appeal had matured for oral argument in the Supreme Court of Virginia; and such administrative action in this Appeal prejudiced the Plaintiffs and violated their Rights of Due Process and Equal Protection of the law as guaranteed by the Fourteenth

Amendment to the Constitution of the United States and Article I, Section 11, of the Constitution of Virginia.

For the reasons stated above, your Petitioners have been denied their Rights guaranteed to them by the Fourteenth Amendment to the United States Constitution, and Article I, Section 11, of the Virginia Constitution, and a Writ of Certiorari should be granted.

CONCLUSION

Your Petitioners, Robert W. Dervishian and William A. Dervishian, pray that a Writ of Certiorari be granted for direct appeal of the Final Order of the Supreme Court of Virginia entered September 18, 1992, and other Orders entered by the Circuit Court of the County of Henrico, Virginia on January 10, 1992, and January 31, 1992; and that all the said Orders be reversed; and that Petitioners Equity cause be remanded to the appropriate Circuit Court for trial on the issues, with instructions for the assignment of another trial judge.

Robert W. Dervishian, Petitioner

William A. Dervishian, Petitioner

Robert W. Dervishian, Esquire, Pro Se
William A. Dervishian, Esquire, Pro Se
600 North Boulevard
Richmond, Virginia 23220
(804) 355-2121

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

ROBERT W. DERVISHIAN, ET AL.,

Plaintiff

v. CHANCERY NO. CH91000344-00

LAURA G. DERVISHIAN,

Defendant.

ORDER

This cause comes now before the court upon the Plaintiffs' Bill of Complaint filed and served in the Circuit Court of the City of Richmond, Equity Case No. HB-173-4, and this cause was transferred upon the Defendant's Motion for Transfer of Venue, and was placed upon the Henrico Circuit Court's Equity docket as case No. CH-91-000-344-000, then came the parties in person and by counsel, upon the Defendant's Demurrer, Plea of Res Judicata and Collateral Estoppel, Motion to Dismiss and Motion Craving Oyer; Plaintiffs' Response thereto; Defendant's Memorandum of Law and Plaintiff's Reply thereto, and exhibits; and the Plaintiffs' Motion for Disqualification of the Honorable James E. Kulp, Judge of the

Circuit Court of Henrico, and the foregoing were argued by counsel.

Accordingly, the Court doth hereby ORDER that the Plaintiffs' Motion for Disqualification of the Honorable James E. Kulp, Judge of the Circuit Court of Henrico in this cause, is hereby denied, and Plaintiffs' oral Motion for Continuance to allow appellate review thereof, is hereby denied.

Further, the Court doth hereby ORDER that the Defendant's Demurrer to the Plaintiffs' Bill of Complaint is hereby sustained and the Plaintiffs are hereby granted leave to file an Amended Bill of Complaint within 21 days from the date of the entry of this order. Having sustained Defendant's Demurrer, the Court does not reach and makes no ruling on Defendant's Plea of Res Judicata and Collateral Estoppel, Motion to Dismiss and Motion Craving Oyer;

And further, for the purposes of the record the Court hereby makes the record of the Henrico Circuit Court Probate Appeal, styled Re: Virginia Dervishian Smith,

Deceased, Case No. CL 90-000-396, a part of the record in this cause.

To all of which rulings and actions by the Court, the Plaintiffs in person and by counsel, object and except.

And further, [Plaintiffs'] Amended Bill of Complaint previously lodged with the Court is hereby deemed filed as of the date of entry of this Order.

And the Clerk is Ordered to mail an attested copy of this Order to each of the parties and counsel of record in this cause.

Enter: 11/4/91, nunc pro tunc 6/14/91

/s/ James E. Kulp, Judge

I ask for this:

/s/ L. B. Cann, III
L. B. Cann, III, Esquire
Counsel for the Defendant,
Laura G. Dervishian

Seen and Objected to:

/s/ Robert W. Dervishian
Robert W. Dervishian, Esquire
Counsel for the Plaintiffs,
Robert W. Dervishian, and
William A. Dervishian

/s/ William A. Dervishian
William A. Dervishian, Plaintiff

FOURTEENTH JUDICIAL CIRCUIT

CIRCUIT COURT OF THE COUNTY OF HENRICO

November 19, 1991

Robert W. Dervishian, Esq.
Wiiiiam A. Dervishian, Esq.
600 N. Bouievard
Richmond, VA 23220

L.B. Cann,III,Esq.
LeCiair,Ryan & Joynes,P.C.
1309-11 East Cary St., SecondFioor
Richmond, VA 23219

Re: Robert W. Dervishian, et al. v. Laura G. Dervishian Case Number CH 91000344

Dear Counsel:

This matter is before the Court upon plaintiffs' Amended Bill of Complaint and the defendant's demurrer and pleas of res judicata and collateral estoppel. The Court heard argument on October 4, 1991, and now renders this opinion.

The plaintiffs' Amended Bill of Complaint contains 61 numbered paragraphs. These allegations can be divided into four categories, and will be addressed separately.

1. Defendant exercised undue influence on Virginia Dervishian Smith to execute a will dated December 9,1988.

In the case the will of Virginia Dervishian Smith dated December 9, 1988, was presented to the Clerk on March 19, 1990, and it was admitted to probate. Plaintiff, Wiiiiam A. Dervishian, appealed the action of the Clerk admitting the will to probate. Pursuant to 64.1-80 the Court made all heirs, including Robert W. Dervishian, parties to the proceeding. The Court empaneled a jury and evidence was presented on May 8, 9, and 10, 1990. The jury returned a verdict finding that Virginia Dervishian Smith had testamentary capacity when she signed the writing dated December 9,1988.

During the trial in May 1990, the Court specifically asked if undue influence would be an issue in the case. At the conclusion of all the evidence, an instruction on undue influence was withdrawn, and the matter was presented to the jury on the sole issue of testamentaty capacity. Clearly, the issue of any undue influence by the defendant in obtaining the will dated December 9, 1988, could have been presented during the May,

1990, proceedings, and the Court allowed the opportunity for such issue to be presented.

The doctrine of res judicata provides that a final judgment on the merits of a claim to cause of action entered by a court of competent jurisdiction is conclusive not only of the issues actually litigated, but to every issue which couid have been brought forward at the time. 8B M.J., Former Adjudication or Res Judicata 52 (1977 Rep. Vol). Accordingly, the Court finds that the allegations of undue influence could have been raised during the May, 1990, proceedings and sustains the defendant's plea of res judicata.

2. Defendant breached her fidiciary duties to Virginia Dervishian Smith.

The plaintiff's allege that defendant breached her fidiciary duties to Virginia Dervishian Smith by self dealing for her own personal gain, benefit and unjust enrichment, and profit. It is alleged that defendant advised

Virginia Dervishian Smith to make various gifts to defendant, to defendant's sisters and others. It is also alleged that defendant caused Virginia Dervishian Smith to change the beneficiary of life insurance to cause such proceeds to go to defendant. There are other allegations of breach of fidiciary duty which are included in the amended Bill of Complaint, and the Court considers each of them under this category.

The defendant has demurred to these allegations. Accepting the allegations as true, the Court is unable to find any cause of action on behalf of plaintiffs. Any fidiciary duty of defendant was owed to Virginia Dervishian Smith and any damages resulting from a breach of fidiciary duty would belong to her estate and not to the piaintiffs. Under the will dated December 9, 1988, plaintiffs were to receive a specific bequest, which they have not alleged they did not receive, and the defendant was to be the beneficiary of the residuary estate. Had Virginia Dervishian Smith not made any gifts to defendant and

others during her life, the gifts wouid have formed a part of her estate which by will wouid have gone to the defendant. The Court is unable to ascertain any detriment to plaintiffs under these circumstances. Additionally, the plaintiffs do not allege that they, or either of them, was a beneficiary under any life insurance poiicy alleged to have been changed. The Court finds that plaintiffs have no standing to raise any claims as to a violation of fidiciary duties by defendant and sustains the defendant's demurrer to each of these claims.

3. Violation of duties as attotney at law, attorney in fact, and defacto Guardian

Plaintiffs allege numerous breaches of duty by defendant as attorney at law, attorney in fact, and defacto guardian, including violations of the standards of the Code of Professional Responsibility. The Court fails to find any duty owed by defendant to plaintiffs in the capacity of attorney at law, or attorney in fact, or guardian. Any duty owed would have been to Virginia Dervishian

Smith and not to plaintiffs. Any lapse of ethical duties would be a matter for the Discipinary Boards of the Virginia State Bar rather than the Court. The Court sustains the defendant's demurrer to all allegations under this heading.

4. Fraud by defendant.

The plaintiffs allege a number of frauds perpetrated by defendant including concealing her actions from plaintiff, William A. Dervishian; presenting the will of December 9,1988, to the Court; and defrauding the heirs of Virginia Dervishian Smith. The finding that Virginia Dervishian Smith had testamentaty capacity when she executed the will of December 9, 1988, precludes these allegations. The Court sustains the defendant's demurrer to all fraud allegations. This case is an attempt to circumvent the finding that Virginia Dervishian Smith had

testamentary capacity when she executed the will of December 9, 1988, and is an attempt to have the will declared void. Plaintiffs have had their day in court on the validity of Virginia Dervishian Smith's will and shouid not be allowed to continue to attack its validity.

The plaintiffs have requested the court to establish a constructive trust and primarily rely upon Virginia Pocahontas Coal Co._v. Lambert,_107 Va. 368 (190y). The Court is of the opinion that no basis exists for the Court to establish a constructive trust. In the Court's opinion the key to this case is the validity of Virginia Dervishian Smith's will of December 9, 1988. As previously observed, the defendant is the residuary beneficiary of this will and as such she is the recipient of the estate after specific bequests have been fulfilled. There are no allegations that bequests have not been fulfllled.

Consequently, the defendant would be entitled to receive all the gifts she and her sisters are alleged to have received.

The Court has previously sustained a demurrer to the Bill of Complaint and allowed the plaintiffs to amend. The Court is of the opinion that plaintiffs cannot make allegations which would entitle them to relief, and that this case should now be dismissed.

For the reasons stated the Court will dismiss this case. It is requested that Mr. Cann prepare an appropriate order carrying out the rulings of the Court. The order should be submitted to the plaintiffs for them to note their objections, and forwarded promptly to the Court for entry.

Sincerely,

/s/ James E. Kulp

James E. Kulp

Judge

JEK:ng

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

ROBERT W. DERVISHIAN, ET AL.,

Plaintiffs,

v. CHANCERY NO. CH91000344-00

LAURA G. DERVISHIAN,

Defendant.

FINAL ORDER

This matter comes before the Court on plaintiffs' Amended Bill of Complaint and defendant's Demurrer and Plea of Res Judicata and Collateral Estoppel, and the Court having heard and considered the argument of counsel, and deeming it just and proper so to do,

It is ORDERED that defendant's Demurrer and Plea of Res Judicata and Collateral Estoppel be, and the same is hereby, sustained for the reasons set forth in the Court's letter opinion dated November 19, 1991, a copy of which is attached and incorporated by reference.

And it further appearing to the Court that it has previously sustained a demurrer to the original Bill of Complaint and granted

plaintiffs leave to amend, and the Court being of the opinion that plaintiffs cannot make allegations which would entitle them to relief,

It is FURTHER ORDERED that this action be, and the same is hereby dismissed with prejudice.

The Court notes for the record plaintiffs' objection to the entry of this Order. Let the Clerk send a certified copy of this Final Order as entered to all counsel of record. The Court dispenses with endorcement of counsel - Rule 1:13.

Enter: 1/10/92

/s/ James E. Kulp, Judge

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

ROBERT W. DERVISHIAN,

and

WILLIAM A. DERVISHIAN, Plaintiffs

v. CHANCERY NO. CH91000344-00

LAURA G. DERVISHIAN, Defendant.

FINAL DECREE

This matter came before the Court on January 31, 1992, upon plaintiffs' Motion To Set Aside The Judgement, the plaintiffs appearing in person, and the defendant appearing by L. B. Cann, III, Esquire. The Court having maturely considered the motion, is of the opinion the motion should be denied; it is therefore

ORDERED and DECREED that the Motion to Set Aside the Judgement is denied to which action of the Court the plaintiffs note their objection.

The transcripts of all proceedings are hereby made a part of the record in this case.

The Clerk is directed to certify a copy of this Decree to counsel of record.

Enter: 1/31/92

/s/ James E. Kulp

Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 17th day of August, 1992.

Robert W. Dervishian, et al., Appellants

against Record No. 920516
Circuit Court No. CH91000344-00

Laura G. Dervishian, etc., Appellee

From the Circuit Court of Henrico County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgement complained of. Accordingly, the Court refuses the petition for appeal.

Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 18th day of September, 1992

Robert W. Dervishian, et al., Appellants

against Record No. 920516
Circuit Court No. CH91000344-00

Laura G. Dervishian, etc., Appellee

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgement rendered herein on the 17th day of August, 1992 and grant a rehearing thereof, the prayer of the said petition is denied.

Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 22nd day of October, 1992

Robert W. Dervishian, et al., Appellants

against Record No. 920516
Circuit Court No. CH91000344-00

Laura G. Dervishian, etc., Appellee

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of the appellants, in proper person, it is ordered that issuance of the mandate in this case be and the same hereby is deferred, to and including the 17th day of December, 1992, on the expiration of which time the same may issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that court.

Judge